THE POWER OF CONGRESS AND OF THE STATES RESPECTIVELY, TO REGULATE THE CONDUCT AND LIABILITY OF CARRIERS.

The rapid increase in the business of transportation, not only intrastate but interstate and foreign, involves a corresponding increase in importance of legislation, both by Congress and by the States, by way of regulation of the conduct and liability of those engaged in such transportation.[1] It is certain that it is within the power of both Congress and the States to enact such legislation, and equally certain that in neither case is such power without limit. But, as it seems to me, there remains to be judicially established any satisfactory test of distinction between such legislation as is, and such as is not, within the legitimate province of Congress and of the States respectively. It is my present object to demonstrate that such a test exists, though not judicially established.

Presumably all such legislation is, or is intended for the benefit of certain persons, or classes of persons. There are three, and, as it seems to me, only three such classes; that is to say, the classification is exhaustive.

First, there is the distinction between *those enjoying the benefit of transportation,* that is, travelers or shippers, and those that are, for the time being, not such. I express this distinction as between *"the public,"*—which, for present purposes, may be regarded as those residing or sojourning within the territory affected,—and those enjoying the benefit of transportation. Perhaps the latter expression is an awkward one, but it will readily be understood as comprehending travelers and shippers generally.

Now it has never been seriously questioned that it is within the powers reserved to the States to regulate the conduct and liability of a carrier for the benefit of what I have called "the public," particularly as to matters involving health or safety. In every State there is a considerable mass of legislation of this character of unquestionable validity. Good illustrations are requirements as to checking the speed of trains,[2] and that a whistle be blown

[1]For the sake of convenience, *foreign* commerce or transportation is not specifically included in this discussion, though, generally speaking, what is said of interstate commerce or transportation is applicable to foreign commerce or transportation.

[2]See, for instance, Erb *v.* Morasch (1900) 177 U. S. 584.

before reaching a crossing. The list might be indefinitely extended. It may be regarded as settled law that the Commerce Clause of the Federal Constitution furnishes no objection to such legislation. The State is not here regulating commerce, and thus encroaching upon the exclusive province of Congress, but exercising a clearly reserved power, the influence upon commerce being merely incidental or indirect.

Turning now, however, to those enjoying the benefit of transportation, that is, travelers and shippers generally, I distinguish between those enjoying the benefit of transportation wholly within the State, and those enjoying the benefit of transportation within the scope of the Commerce Clause, a distinction which will of course be readily apprehended, being illustrated by one person traveling or shipping between Albany and Buffalo, and another traveling or shipping between Albany and Chicago.

As with regulation for the benefit of the public, so it seems beyond question that it is within the power of a State to regulate the conduct and liability of a carrier for the benefit of intrastate travelers and shippers, a good illustration being the power to regulate rates for transportation. In this connection, some confusion of thought may arise from the circumstance of the frequent employment of the same agencies for both classes of transportation. A train is operated between New Haven and New York, transporting passengers, some between points in Connecticut and points in New York, some between points both in New York, some between points both in Connecticut. Now the State of New York undertakes to prohibit the carrier operating such train from heating the cars by stove or furnace.[3] Obviously this operates, as is doubtless intended, for the benefit of those traveling between points both in New York, but, as a matter of practical necessity, it also operates for the benefit of those traveling between points in Connecticut and points in New York, or between points both in Connecticut. But the important point to note is that such legislation finds its justification (so, at least, it seems to me) in that it is for the benefit of *those who travel wholly within the State of New York*, though incidentally others are benefited. As it seems to me, it finds no justification in that it is for the benefit of those traveling wholly within the State of Connecticut, or between points in Connecticut and points in New York.

Is it then within the power of a State to legislate directly for

[3]See N. Y., N. H. & H. R. R. Co. *v.* New York (1897) 165 U. S. 628.

the benefit of interstate travelers and shippers? Is not this regulation of commerce pure and simple, and thus an encroachment upon the exclusive province of Congress? I shall presently endeavor to show, however, that such legislation is sanctioned by the doctrine now prevailing in the Supreme Court. Nevertheless, there are at least two comparatively early decisions of that court, which have never been expressly overruled, and which seem to me to rest substantially on the proposition that such legislation is a regulation of commerce pure and simple, and thus beyond the power of the States. I refer to *Hall* v. *DeCuir*[4] and *Wabash, St. Louis & Pac. Ry. Co.* v. *Illinois.*[5]

In *Hall* v. *DeCuir,* a State statute requiring that travelers be given equal rights and privileges in all parts of the conveyance, was held invalid as applied to a carrier transporting between points in different States. In *Wabash, St. Louis & Pac. Ry. Co.* v. *Illinois,* a statute prohibiting discrimination in rates for transportation met a similar fate. Now it is clear that a State may prohibit such discrimination as to transportation wholly between points within the State.[6] It seems to follow that the lack of power under the conditions existing in *Wabash, St. Louis & Pac. Ry. Co.* v. *Illinois* depends on the distinction between transportation wholly within the State, and transportation within the scope of the Commerce Clause.

If the distinction holds good as to the duty to give equal rights and privileges in the carrier's conveyance, and as to discrimination in rates, it seems hard to see why it should not hold good generally as to regulation of the conduct and liability of carriers.

Nevertheless, in *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio,*[7] the Supreme Court sustained a statute requiring trains to stop at certain points, as applicable to transportation between points outside the State (Chicago and Buffalo), this being clearly regarded as a provision for the benefit of interstate passengers. If this be not regulation of commerce pure and simple, I am at a loss to see what is. The majority opinion seems to reveal an extremely confused conception of the nature and scope of "the police powers of the States." But I am unable to see that the situation is improved by a mere juggling with such phrases as "police power."

[4](1877) 95 U. S. 485.

[5](1886) 118 U. S. 557.

[6]See, for instance, Louisville & Nashville R. R. Co. *v.* Kentucky (1902) 183 U. S. 503, 518.

[7](1899) 173 U. S. 285.

The following cases seem to me to be open to objection on the same general ground: *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Solan,*[8] sustaining a statute relating to exemption from liability; *Richmond & Alleghany R. R. Co.* v. *R. A. Patterson Co.,*[9] sustaining a provision as to the obligation assumed by a carrier accepting for transportation beyond his own line; *Missouri, Kansas & Texas Ry. Co.* v. *McCann,*[10] sustaining the imposition of liability for negligence of a connecting carrier. These instances are merely illustrative; others might be cited.

But *Central of Georgia Ry. Co.* v. *Murphey* [11] seems to indicate that at last there had dawned upon the court a realization that the process of sanctioning such legislation had been carried too far. In that case the court held invalid a provision imposing certain duties upon an initial or connecting carrier, they being regarded as of an "onerous" character. Similarly, in *Houston & Texas Central R. R. Co. v. Mayes,*[12] a requirement as to furnishing cars was held invalid, this being thought to "amount to a burden upon interstate commerce." In a rather helpless fashion, as it seems to me, the court used the following language:

"The exact limit of lawful legislation upon this subject cannot in the nature of things be defined. It can only be illustrated from decided cases, by applying the principles therein enunciated, determining from these whether in the particular case the rule be reasonable or otherwise."

Does not this suggest the famous remark of Bunsby that "the bearings of this observation lays in the application on it"?

On the whole, apart from the uncertain authority of some earlier decisions, and the vague rule that the regulation shall not be "onerous" or "amount to a burden," the Supreme Court seems to recognize no definite limitation upon the power of a State to regulate the conduct and liability of a carrier, even though such regulation be for the benefit of interstate travelers and shippers.

But I turn now to a consideration of the power of Congress to regulate such conduct and liability. Unquestionably, under the Commerce Clause, Congress has such power, which, however, is certainly not without limit. And the classification already considered seems to me to furnish the rule of limitation. Thus, un-

[8] (1898) 169 U. S. 133.
[9] (1898) 169 U. S. 311.
[10] (1899) 174 U. S. 580.
[11] (1905) 196 U. S. 194.
[12] (1906) 201 U. S. 321, 328.

doubtedly Congress can exercise such power for the benefit of interstate travelers and shippers. This seems the true basis of the validity of the Interstate Commerce Act,[13] from the application of which transportation "wholly within one State" is by its terms expressly excluded, and of the Safety Appliance Act,[14] the validity of which was said in *Adair* v. *United States*[15] to have been sustained on the ground that "it manifestly had reference to interstate commerce and was calculated to subserve the interests of such commerce by affording protection to employés and travelers."

It seems equally clear that it is beyond the power of Congress to exercise such power directly for the benefit of intrastate travelers and shippers. This conclusion seems in accord with the statement in *Gibbons* v. *Ogden*,[16] reiterated in *The Employers' Liability Cases*,[17] that the power does not extend to "that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." In this connection, however, it should be borne in mind that the power of Congress to enact legislation incidentally affecting such internal commerce is very broad, and not easily to be defined. The illustration already employed of prohibition from heating cars by stove or furnace is susceptible of application here as showing that legislation by Congress may, as a matter of practical necessity, operate for the benefit of intrastate travelers and shippers.

But the main difficulty in this connection seems to be furnished by the remaining class of persons to be benefited, that is "the public." Is it within the power of Congress directly to regulate, for the benefit of this class, the conduct and liability of those engaged in transportation? It has already been seen that such power is among those reserved to the States, and I am at a loss to see how it can exist in Congress.

Now the validity of the much discussed Employers' Liability Act[18] seems to me to depend on whether it is properly to be regarded as for the benefit of interstate travelers and shippers, or of the public, that is to say, a particular portion of the public, employees of carriers. This may be essentially a question of fact.

[13] 24 U. S. Statutes at Large, 379.
[14] 27 U. S. Statutes at Large, 531.
[15] (1908) 208 U. S. 161, 177.
[16] (1824) 9 Wheat. 1, 194.
[17] (1908) 207 U. S. 463, 493.
[18] That is, the Act of April 22, 1908; 35 U. S. Statutes at Large, 65.

In *Watson* v. *St. Louis, I. M. & S. Ry. Co.*,[19] where the Act was sustained, it was said that the enactment thereof "not only results in protecting the employés of carriers by rail, but at the same time guards the public welfare *by securing the safety of travelers.*" If this be true, as a matter of fact, it seems to me to follow that the Act is, like the Safety Appliance Act, within the power of Congress. On the other hand if, as a matter of fact, the Act operates *merely* for the benefit of the employees of carriers, I am unable to see that it is. In this view, it seems properly to be classed with legislation merely for the benefit of "the public" and thus beyond the power of Congress. Perhaps *Adair* v. *United States* tends, so far as it goes, to support this view, it being there held that

"there is no such connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employé, because of such membership on his part."[20]

FREDERICK H. COOKE.

NEW YORK.

[19](1909) 169 Fed. 942, 950.

[20](1908) 208 U. S. 161, 179.